No. 72-402

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED ELECTRIC COAL COMPANIES, AND FREEMAN COAL MINING CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
THOMAS E. KAUPER,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
MARK L. EVANS,
Assistant to the Solicitor General,
CARL D. LAWSON,
JOHN B. WYSS,
Attorneys.
Department of Justice,
Washington, D.C. 20530.

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1. The major portion of appellees' brief (pp. 12-48) consists of a detailed factual discussion of the evidence that allegedly supports the district court's finding that the combination of the Freeman and United Electric coal companies would not substantially lessen competition. Thus, appellees discuss in detail, among other things, the evidence relating to the economic strength of electric utilities in bargaining with coal companies, the reasons why the merging companies allegedly really were not competing with each other with respect to the substantial sales they made to the same cus-

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tomers, and the testimony of industry personnel that the merger would not adversely affect competition. They make no attempt, however, to refute the analysis in our opening brief that under the settled principles announced by this Court in a series of decisions over the last decade applying Section 7 of the Clayton Act, this merger is illegal because it significantly increased concentration in, and produced a firm controlling an undue percentage of, a concentrated market.

As we there explained, the concern of Congress in amending Section 7 of the Clayton Act in 1950 was to stem "what was considered to be a rising tide of economic concentration in the American economy" (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 315). The legislation was designed to block "mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency" (*id.* at 317). The focus of the statute was on changes in market structure that mergers produce rather than on specific competitive behavior; the purpose was "the protection of *competition,* not *competitors*" (*id.* at 320, emphasis in original). Section 7 deals "with probabilities, not certainties" (*id.* at 323) and "[t]his intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363).

The determination whether the effect of a particular merger may be substantially to lessen competition requires an examination of its impact upon the struc-

ture of the relevant markets. First, "[t]he 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')" (*Brown Shoe,* 370 U.S. at 324). It is only after the geographic and product markets have been properly defined that an informed judgment can be made whether the merger has the proscribed anticompetitive probability "in any line of commerce in any section of the country." [1]

"Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power * * *" (*Brown Shoe,* 370 U.S. at 322, n. 38). "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market" (*id.* at 343, fn. omitted).

The district court here did not analyze or evaluate the probable effect of this merger on the structure of the relevant markets—coal as the product market and the Eastern Interior Coal Province sales area and the State of Illinois as the geographic markets (see our opening brief, pp. 20–50). Nor do appellees make any serious attempt to show that the district court cor-

[1] There may be situations in which the competitive impact of a merger may also be demonstrated in sections of the country which are not markets in the traditional customer-supplier sense, but which, nevertheless, are economically distinct areas within which competition occurs. See our jurisdictional statement in *United States* v. *The Connecticut National Bank, et al.*, No. 73–767. This is not such a case, however.

rectly applied the standards this Court traditionally has recognized as the proper touchstone for determining the validity of horizontal mergers.[2]

Instead, appellees argue (Br. 2) that the district court rulings on "market definition" that the government challenges "were neither critical to, nor controlling of, the decision below." This contention is directly at odds with this Court's admonitions that a proper assessment of the effect of a merger can be made "only in terms of the market affected" (*United States* v. *duPont & Co.*, 353 U.S. 586, 593), and that "the proper definition of the market is a 'necessary predicate' to an examination of the competition that may be affected by the horizontal aspects of the merger" (*Brown Shoe*, 370 U.S. at 335). The district court's failure to focus on this critical issue and to apply the many decisions of this Court that have invalidated horizontal mergers on the basis of the kind of struc-

[2] Appellees cite this Court's opinion in *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, for the proposition that market definition may be here ignored. The issue in that case, however, was whether it was essential for the government to delineate a section of the country "by metes and bounds as a surveyor would lay off a plot of ground" (384 U.S. at 549, fn. omitted). The Court held it was enough to prove that "the merger may have a substantial anticompetitive effect somewhere in the United States—'in *any* section' of the United States" (*ibid.*; emphasis in original). Proof of the precise boundaries of the geographic market was held to be "entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition *anywhere* in the United States" (*id.* at 550; emphasis added). There is no implication that market definition may be dispensed with, only that metes and bounds precision is unnecessary.

tural analysis presented in our opening brief invalidates its conclusion that this merger did not have the anticompetitive effects proscribed by Section 7.

2. Appellees suggest, however (Br. 64–65), that this Court's decisions establish only that a merger producing such anticompetitive changes in market structure is *prima facie* illegal, and they contend that the district court's findings refute any *prima facie* illegality the government has shown.[3] To the extent that this argument stems from the claim that, at the time of the acquisition, United Electric's resources were so inadequate that it was no longer a viable entity and hence not a significant competitive factor in the market, we have answered it in our opening brief (pp. 63–74; see, also, point 3, *infra*). Implicit in appellees' contention, however, is the implication that there is something special about the coal industry that justifies a different approach and standard for determining the anticompetitive consequences of a horizontal merger of major firms. The suggestion that general antitrust principles should not be fully applied to particular industries is not novel, however (cf. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138,

[3] Appellees argue that this *prima facie* illegality is significant only when the district court "dismiss[es] the complaint at the close of the Government's case on the ground that it had failed to carry its initial burden of proof" (Br. 64). In *Philadelphia Bank*, itself, however, in which the theory was articulated, the government appealed from a judgment for the defendants after trial (374 U.S. at 323). The Court applied the same structural analysis in invalidating the merger in *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, where the district court had upheld the merger after a full trial.

n. 4). This Court has rejected such arguments before and should do so in this case.[4]

3. Appellees argue that the inadequate resources argument made in our opening brief (pp. 63-74) (1) was not made in our Jurisdictional Statement (Br. 2, 70, n. 99) and (2) is inconsistent with our position in the district court (Br. 74-75). The first of these claims is answered in our principal brief (p. 70, n. 47). The second is incorrect.

The government argued in its post-trial brief in the district court (p. 143) that United Electric's "inability to acquire additional coal reserves * * * is not a ground for approving an otherwise anticompetitive merger." More particularly, we urged there, as we do here (p. 144):

> The argument that the lack of reserves lessens future anticompetitive effect and therefore justifies the merger infers that [United Electric] is an *in futuro* wasting asset "failing company," entitled to the benefits of the failing company doctrine.

We urged that appellees had failed to satisfy the requirements of such a defense (pp. 143-146).

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[4] In *United States* v. *Aluminum Company of America*, 377 U.S. 271, the appellees contended that the increases in concentration which the merger there produced were not sufficient to establish anticompetitive effect because of other countervailing market conditions. Brief for appellees, No. 204, O.T. 1963, pp. 49-51. This Court, however, held the merger invalid because of its change in the structure of the market: it increased Alcoa's share of the aluminum conductor market by 1.3 percent.

See, also, the argument of the Comptroller of the Currency at pages 35-39 of his brief in *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, No. 1093, O.T. 1969.

Similarly, our proposed conclusions of law included the following (p. 7; emphasis added):

> The United Electric Coal Companies' limited coal reserve position, *whether considered at the time of its merger into defendant General Dynamics* [1967], *or at the time it became controlled by defendant General Dynamics* through its subsidiary, defendant Freeman Coal Mining Corporation [1959], is not a defense to an otherwise unlawful merger of the United Electric Coal Companies into defendant General Dynamics Corporation. [Citing, *inter alia, Citizen Publishing Co.* v. *United States,* 394 U.S. 131.]

Appellees argued in response, as they argue here, that they were not required to meet the general standards for a failing company defense (post-trial brief, pp. 81–82). Indeed, their brief expressly acknowledged "the government's reliance * * * on cases concerning financially failing companies" (*id.* at 82).

Earlier in the proceeding, during the deposition of the appellees' expert, Professor Steiner, government counsel raised the issue. Among the questions he asked Professor Steiner were the following (A. 809):

"Directing your attention to that time, Professor, in your opinion was United Electric a firm which was heading inevitably in the direction of bankruptcy, with the grave probability that failure would ensue, that is, that the trend was irreversible?

* * * * *

"And Professor, is it your opinion that at the time in question, November of 1966, there were available to United Electric no reasonable, possible distinguishable or feasible alternatives which would have permitted

United Electric to remain an independent competitive factor within the bituminous coal industry?"

This is not a "newly concocted argument" (Br. 75). Our position in the district court was essentially the same as it is here: whether United Electric had ceased to be a significant factor in the coal business because of its allegedly inadequate reserves is a defense to be tested by the same standards applied under the failing company defense, and the critical time is when the acquisition took place (either 1959 or 1967).[5]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

DANIEL M. FRIEDMAN,
Deputy Solicitor General.

MARK L. EVANS,
Assistant to the Solicitor General.

CARL D. LAWSON,
JOHN B. WYSS,
Attorneys.

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[5] Appellees point to a single finding of the district court that covers the period from 1959 to the present (Br. 74), but that finding does not bear on whether United Electric's reserves were at that time so depleted that it faced the imminent prospect of going out of business. Appellees also refer to some evidence in the record relating to the availability of strip reserves during the 1960's (Br. 71–74), but there is nothing to suggest that United Electric was about to cease operation or that there was no alternative means of rehabilitation short of merger with one of its largest competitors.

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